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No. 93-1137

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In The

Supreme Court of the United States

October Term, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

JOHN KOCHAN, CLARENCE GRANGER AND HILMA GRANGER, HERMAN DAVIS AND ELIZABETH DAVIS, HARRY RENEAU AND ARVADA RENEAU, CLARENCE WOODWARD AND URSEL WOODWARD,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court of Illinois, Fifth District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROVIDE DEFENDANTS IN MASS TORT CASES WITH A SUBSTANTIVE RIGHT TO AVOID THE ASSESSMENT OF SUCCESSIVE PUNITIVE DAMAGE AWARDS, IN THE ABSENCE OF PROOF THAT THE DEFENDANT HAS ACTUALLY PAID PUNITIVE DAMAGES FOR THE SAME ACTIONS?

II. DO THE ILLINOIS RULES FOR REVIEWING PUNITIVE DAMAGE AWARDS FOR EXCESSIVENESS, WHICH PROVIDE FOR FULL APPELLATE REVIEW BUT CONFINE APPELLATE CONSIDERATION OF THE FACTS TO MATTERS OF RECORD AT THE TIME OF JUDGMENT, VIOLATE DEFENDANTS' RIGHTS TO PROCEDURAL DUE PROCESS?

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STATEMENT OF THE CASE

This is a products liability case brought in Illinois and governed by Illinois procedural and substantive law. Respondents, five victims of asbestos-related diseases and the wives of four of them, brought five separate suits in Madison County, Illinois against petitioner Owens-Corning Fiberglas Corporation ("OCF") and numerous other manufacturers of asbestos-containing products, claiming compensatory damages. The cases were consolidated for discovery, for trial, and ultimately for appeal.

Prior to trial, respondents moved for leave to claim punitive damages against certain defendants in the case, including OCF, pursuant to Ill.Rev.Stat., ch. 110, par. 2-604.1 (1989). That statute provides that a plaintiff may not allege entitlement to punitive damages in a pleading unless the plaintiff moves for leave of court to do so and establishes at a pre-trial evidentiary hearing "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Id.* The defendants, including OCF, resisted the motion. Significantly, however, although punitive damages had been alleged and awarded against OCF in other products liability actions involving its manufacture and sale of asbestos products, OCF chose not to reveal those awards to the trial court and decided not to argue that the aggregate amount of such awards provided a substantive due process bar against the award of punitive damages in this case. Following a lengthy hearing, the trial court granted the motion and allowed respondents to seek punitive damages from OCF and several other defendants.

Respondents proceeded to trial against OCF in October of 1990, having settled with all other defendants. All of the five respondents who had sustained an asbestos-related illness presented proof that their disabling injuries were caused by occupational exposure to OCF asbestos products. Respondents also submitted proof that in marketing the products to which respondents were exposed, OCF had, in the words of the Illinois Appellate Court, exhibited "an utter indifference to, or conscious disregard for the safety of others," A-19, warranting the imposition of punitive damages under Illinois law. Specifically, the Illinois Appellate Court observed that respondents' evidence

> showed that defendant was aware of the hazards of asbestos, chose not to disclose the information, and failed to place warning labels on the product at the time that it knew of the hazards of the product. In fact, defendant apparently chose to stockpile the information in the event that it could be beneficial in marketing other products.

A-18-19. At the close of the trial, OCF moved for a directed verdict on the issue of punitive damages. OCF offered no evidence at this time, though, that it had been assessed punitive damages in any other cases. The trial court denied OCF's motion, and submitted respondents' claims for compensatory and punitive damages to the jury.

The jury returned a verdict awarding substantial compensatory damages to each injured respondent and his wife, ranging from $138,000.00 to $480,000.00. The jury also awarded each respondent $1 million in punitive

damages. The trial court entered judgment on the jury's verdict.

OCF then filed a post-trial motion seeking judgment notwithstanding the verdict or a remittitur of the punitive damages awards. In support of that motion, OCF argued that the awards should be reduced or set aside in their entirety because OCF had been adequately punished by other punitive damages awards assessed for the manner in which it marketed its asbestos products. In order to provide some factual support for its claim that it had been punished enough, OCF submitted the affidavit of one of its in-house lawyers, "litigation counsel" Robert A. McOmber.

The trial court denied OCF's post-trial motion. In a written order, A-48-55, the court initially explained that OCF had waived its argument that OCF's liability for punitive damages in other cases required nullification or reduction of the awards in this case, noting that "this argument was not made at the time of trial" and that "the McOmber affidavit was not filed at the time of trial." A-53.

Notwithstanding its ruling regarding OCF's waiver, the trial court fully considered, and completely rejected, the merits of OCF's argument, giving two reasons for its decision. First, the trial court explained that, contrary to OCF's "claim that [it] ha[d] already been punished sufficiently," A-53, the facts alleged in the McOmber affidavit filed in support of that claim did more to undercut than to support the claim:

> [W]hile OCF lists several prior punitive awards in the McOmber affidavit, in only one case does

> OCF claim to have *paid* punitive awards. A party cannot be excessively punished with a mere verdict and judgment. Punishment only occurs when payment is made.

A-53 (emphasis in original).

Second, the trial court noted that the McOmber affidavit did not describe "what evidence was presented in those other cases resulting in punitive awards," and stated that it was unwilling to "guess[ ] about what conduct led to the awards." *Id.* The trial court therefore concluded that OCF had failed to demonstrate that it had in fact been punished for the same course of conduct upon which the punitive awards in the instant case were based, and, accordingly, rejected OCF's post-trial attack on the punitive awards as being "without merit even in the absence of waiver." A-54.[1]

On appeal to the Illinois Appellate Court, Fifth District, OCF argued, *inter alia*, that the trial court's rulings abridged its rights to substantive and procedural due process guaranteed by the Fourteenth Amendment. In that court, as in this one, OCF insisted that it had the substantive due process right to be immune from multiple awards of punitive damages for the same course of conduct and asserted that the McOmber affidavit had provided ample evidence that multiple punishments had, in fact, been imposed on OCF for what was, in fact, the same course of conduct. The Illinois Appellate Court

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[1] OCF's representation in its petition that the trial court denied OCF's post-trial motion to vacate or reduce the punitive awards "without discussing the merits of this issue," Pet. at 5, is thus demonstrably false.

rejected that contention, ruling that far from presenting ample evidence of violations of substantive due process, OCF had failed to present any evidence of such violations, at least no evidence "until after the trial," A-28, that is, when OCF tendered the McOmber affidavit in support of its motion for a JNOV. Nevertheless, although the Illinois Appellate Court found it unnecessary to consider whether the Fourteenth Amendment bars multiple punitive damages awards, that court emphasized that defendants are safeguarded against multiplicative and therefore excessive awards of punitive damages as a matter of state law. A-28-29, citing *Hazelwood v. Illinois Central Gulf Railroad*, 114 Ill.App.3d 703, 71 Ill.Dec. 320, 450 N.E.2d 1199 (Ill.App. 4th Dist. 1983).

OCF also claimed that Illinois' standards for post-trial and appellate review of punitive damages awards do not comport with the procedural due process requirements comprised in the Fourteenth Amendment. The Illinois Appellate Court unanimously disagreed, holding that "post-trial and appellate review in Illinois does provide a meaningful constraint on the jury." A-25. That court noted that the applicable Illinois statute expressly authorizes a trial court to order a remittitur and conditional new trial upon finding that a punitive damages award is excessive. A-26, citing Ill.Rev.Stat. ch.110, par. 2-1207 (1989). The Illinois Appellate Court also stressed that Illinois has expressly recognized the obligation of its appellate courts to review punitive damages awards for excessiveness, and specifically requires appellate courts to consider, among other factors, "the enormity of the wrong, the defendant's financial status, and the potential liability of the defendant," in considering whether a

punitive damages award is excessive. A-26, citing *Hazelwood, supra.* Finally, the Illinois Appellate Court observed that Illinois' procedures for screening punitive damages claims prior to trial, codified in Ill.Rev.Stat. ch. 110, par. 2-604.1 (1989), provide defendants with additional protection from punitive damages claims that may be unwarranted or excessive. A-26-27. The appellate court concluded that Illinois' procedures for protecting defendants from unreasonable punitive damages awards are "constitutionally sufficient." A-26.

Accordingly, the Illinois Appellate Court unanimously affirmed the trial court's refusal to disturb the punitive damages awards.

OCF then petitioned the Illinois Supreme Court for leave to appeal. That court stayed its consideration of OCF's petition pending this Court's decision in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993). Following the issuance of *TXO*, the Illinois Supreme Court unanimously denied OCF's petition.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT REVIEW TO CONSIDER OCF'S SUBSTANTIVE DUE PROCESS ARGUMENT.

A. The Court Has Repeatedly Denied Petitions for Certiorari Raising Virtually Identical Questions, Including a Petition Filed Earlier This Term by OCF.

OCF first urges this Court to grant certiorari to consider whether a defendant who has been found guilty of

inflicting numerous injuries through the mass marketing of defective products over many years enjoys protection from multiple punitive damages awards as a matter of substantive due process. OCF contends that mass tortfeasors enjoy such rights, especially "*where* the aggregate amount of the punitive damages awarded is greater than is reasonably necessary to punish and deter," Pet. at 6 (emphasis added), "*where* society's goals of punishment and deterrence have been fully served," Pet. at 7 (emphasis added), "*where* the punishment is disproportionate to the defendant's culpability," Pet. at 8 (emphasis added), *where* "the retributive function normally fulfilled by punitive awards has been fully satisfied by the punitive amount of compensatory damages awarded in thousands of cases," Pet. at 9, and *where* the "thousands of cases brought by plaintiffs who claim injuries aris[e] out of the same general course of conduct," Pet. at 6.

The question presented is a familiar one – to both the Court and to OCF. Indeed, OCF raised virtually the same question in a petition for certiorari filed less than five months ago and denied without dissent by this Court less than two months ago. *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied sub nom., OCF Corp. v. Dunn* (No. 93-658), 62 U.S.L.W. 3407 (U.S. Dec. 14, 1993). It is interesting to note that although this Court denied OCF's petition for certiorari in *Dunn* on December 13, *more than three weeks before the instant petition was filed*, OCF concealed that fact from this Court, going as far as to cite that case merely as "*Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993)." *See, e.g.*, Petitioner's Table of Authorities at *vii* and Pet. at 3, n.1.

The substantive due process question presented in the instant petition has been, to be sure, *styled* somewhat differently than the question presented in the petition that was filed by OCF on October 25, 1993 and denied by the Court on December 13, 1993 – chiefly by substituting one adverb for another ("where" for "when"), by combining three questions into one, and by rearranging key phrases.[2] As a matter of substance, however, the questions presented in OCF's multiple petitions are essentially identical.

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[2] The substantive due process questions presented in OCF's petition in *Dunn* were:

> (1) Do additional awards of punitive damages in mass tort litigation become constitutionally excessive under the Due Process Clause *when* defendant's *liability for compensatory damages* and other expenses (including other punitive damages awards) *will itself suffice to inflict whatever punishment and deterrence might be necessary* – and *when* further punitive damages awards could jeopardize future plaintiffs' ability to obtain compensation for their injuries?
>
> (2) Do additional awards of punitive damages in mass tort litigation violate the Due Process Clause *when* defendant is being *punished repeatedly* and without limitation *for a single course of conduct*?
>
> (3) Do additional awards of punitive damages in mass tort litigation violate the Due Process Clause *when* punitive damages are *no longer needed to punish and deter* defendant and *when* they constitute *repetitive and unlimited punishment for the same course of conduct*?

OCF's Petition for Certiorari, No. 93-658 (filed Oct. 25, 1993, 62 U.S.L.W. 3399 (U.S. Dec. 7, 1993)) in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied sub nom., OCF Corp. v. Dunn* (No. 93-658), 62 U.S.L.W. 3407 (U.S. Dec. 14, 1993) (emphasis added).

Nor are the questions presented by OCF in this case and in *Dunn* themselves original and uncommon; at least *eight similar petitions have been filed in the past four years* by OCF's fellow asbestos manufacturers (and OCF's co-defendants in numerous cases). Each of these previously-filed petitions has asked the Court to hold that the Due Process Clause protects mass tort defendants from the imposition of multiple punitive damages awards; significantly, the Court has denied review in every case.[3]

OCF has not explained why it has filed two fundamentally interchangeable petitions within months of each other, or why the second petition, the instant petition, fails to mention that the first was filed with, and denied by, this Court; certainly, OCF has not cited any intervening development – such as a pertinent decision by this Court or by any other court – that justifies its decision to burden this Court with duplicative petitions. It seems, though, that OCF passionately believes in the rightness of its cause and passionately believes that this Court has a duty to fashion a "national solution" (curiously suggesting that the Court should fashion one along the lines of *Miranda v. Arizona*, 384 U.S. 436 (1966), *Escobedo v. Illinois*,

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[3] *Fibreboard Corp. v. Pool*, 813 S.W.2d 658 (Tex.Ct.App. 1991), *cert. denied*, 113 S.Ct. 3064 (1992); *Owens-Illinois, Inc. v. Bolyard*, 113 S.Ct. 462 (1992); *Keene Corp. v. Adams*, 113 S.Ct. 462 (1992); *Solly v. Manville Asbestos Disease Fund*, 966 F.2d 1454 (6th Cir.), *cert. denied sub nom., Owens-Illinois, Inc. v. Roby*, 113 S.Ct. 411 (1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236 (1991); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.), *cert. dism'd*, 497 U.S. 1057 (1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990).

378 U.S. 436 (1964) and *Mapp v. Ohio*, 367 U.S. 643 (1961), Pet. at 13, and the Court's interstate commerce cases, Pet. at 14) in order "to prevent the continued violation of the constitutional rights of corporate defendants in mass tort litigation." Pet. at 13.

Evidently, OCF also believes, with equal fervor, some other things: that the Court's previous rulings were in error; that the Court does not sufficiently appreciate the gravity of the "national" crisis bedeviling multiple tortfeasors and does not adequately comprehend the "critical need for the Court's intervention," Pet. at 14; that "[t]his Court must shoulder the responsibility for preventing repeated awards of punitive damages for the same acts or series of acts," Pet. at 13; and that the Court must no longer duck the issue, that is, "[t]his Court should delay no further in addressing the[se] due process concerns . . . ." Pet. at 4.[4]

In short, OCF passionately insists that, this time, the Court must get it right. Respondents respectfully submit that the Court has gotten it right all along.

B. Even If the Instant Petition Did Not Duplicate Arguments Just Recently Rejected by the Court, a Grant of Certiorari Would Still Not Be Warranted Because the Cases Cited by OCF Do Not Support Its Arguments.

OCF's failures to inform the Court about the Court's recent disposition of OCF's petition in that case and to

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[4] Thus, OCF admonishes the Court to jettison the principles of judicial restraint in order to contrive a cure for this momentous national crisis, *viz.*: " '[i]t is judicial paralysis, not activism, that is the problem in this area.' " Pet. at 4, quoting *Dunn*, *supra*, at 1399 (Weis, J., dissenting).

cite it accurately in the instant petition are compounded by its inability to distinguish between the holding and the dissent in *Dunn*, repeatedly citing the latter as if it were the former. Thus, although OCF cites *Dunn* as supporting the proposition that "at some point multiple punitive damages awards in mass tort cases exceed [the purpose of punishment and deterrence] and violate due process," Pet. at 3 n.1, the majority in *Dunn* actually concluded that "multiple punitive damages awards are not inconsistent with the due process clause." 1 F.3d at 1386. *See also* Pet. at 14. Similarly, OCF either misapprehends or misrepresents the other cases cited for the same proposition.

Indeed, OCF's misplaced reliance on the dissent in *Dunn* is telling. OCF has not found a single reported case from any jurisdiction in which a court has struck down or reduced a punitive damages award on the ground that, under the Fourteenth Amendment's Due Process Clause, the defendant had already been punished enough by other awards. On the other hand, at least three federal circuits and three state supreme courts have rejected in reported opinions arguments by defendants in asbestos cases that the punitive damages awards in those cases should be vacated or reduced because such awards constitute repetitive punishment in violation of defendants' rights to substantive due process.[5] Far from showing a

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[5] *See Dunn, supra* (Third Circuit), *Glasscock, supra* (Fifth Circuit), and *Simpson, supra* (Second Circuit); *Spaur v. Owens-Corning Fiberglas Corp.*, No. 92-1452, 1994 WL 14381 (Iowa Jan. 19, 1994), at *11-*15; *Davis v. Celotex Corp.*, 420 S.E.2d 557, 565-66 (W.Va. 1992); *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 472 (Md. 1992).

conflict among the lower courts on this issue, the decisions across the country are remarkable in their consistency. Exercise of this Court's discretionary power of review is therefore unwarranted under Sup.Ct.R. 10.

C. The Record in This Case Does Not Support the Question Presented; Even Assuming the Existence of the Substantive Due Process Right Claimed by OCF, That Right Would Not Be Implicated Under the Facts of This Case.

The relief that OCF requests requires both recognition of a new substantive constitutional right to avoid the imposition of multiple punitive damages awards *and* a factual determination that OCF has been punished enough by prior punitive damages awards to deserve this constitutional protection. As in *Dunn* and the other previous cases in which the Court has denied certiorari, OCF is unable to present this Court with record evidence that would support a factual determination that it has been "punished enough" for injuring thousands of persons exposed to its dangerous products and "punished enough" to deter other potential tortfeasors from similar misconduct in the future.

In the end, OCF's substantive due process argument rests on three factual assumptions, none of which are supported by the record: one, that OCF actually has paid multiple punitive damages awards; two, that such awards arose from the same course of conduct; and three, that the

aggregate amount of such awards is " 'greater than reasonably necessary to punish and deter.' " Pet. at 12, *quoting Pacific Mut. Life Ins. Co. v. Haslip*, 113 L.Ed.2d 1, 23 (1991).

First, OCF has not produced, either inside or outside the trial record, any evidence allowing the Court to conclude that punitive damages actually have been *imposed on* and *paid by* OCF for its conduct in knowingly mass-marketing hazardous asbestos products. As the trial court pointed out, A-53, the belatedly filed McOmber affidavit indicates that at the time of judgment, OCF had actually paid only one punitive damages award. *See* McOmber affidavit at A-94.[6]

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[6] The McOmber affidavit is quite telling, but in ways unintended by OCF. According to the McOmber affidavit, during the 32 year period from May 1958 through November 1990, "substantial punitive damages jury *verdicts*" (which that affidavit defines as verdicts awarding punitive damages in amounts of $100,000 or more) "have been awarded against OCF", A-92, in only eight cases, A-93-96, with non-substantial punitive damages, *i.e.*, between $8,000 and $25,000, being awarded in three additional cases. A-96-97.

Of the eleven (11) cases cataloged in the McOmber affidavit as cases in which awards of punitive damages totaled $8,000 or more, OCF had negotiated post-verdict settlements in four cases (*Davis v. OCF, Gizzi v. OCF, Schoenian, Harler and Tusic v. OCF*, A-94-96, and *Barry v. OCF*, A-96), punitive damages awards had been reversed or set aside in two cases (*Coles v. OCF* and *Marcelli v. OCF*, A-97), jury verdicts had not been reduced to judgments in two cases (*Adams, et al. v. OCF* and *Barnes, et al. v OCF*, A-95-96), and post-trial motions or appeals were either being contemplated or were pending in the remaining three cases (*Watson v. OCF, Reneau, et al. v. OCF*, and *Dunn v. OCF*, A-94-95).

Indeed, notwithstanding Mr. McOmber's concluding (and conclusory) assertion that "OCF has already paid millions in

Second, OCF has not produced, either inside or outside the trial record, any evidence that the punitive damages actually assessed against OCF arose from the same course of conduct. As the trial court noted, the McOmber affidavit did not describe "what evidence was presented in those other cases resulting in punitive awards," A-53, and therefore declared that it was unwilling to "guess[ ] about what conduct led to the awards." *Id.*

Third, the question presented requires the Court to assume that the aggregate punishment inflicted on OCF is " 'greater than reasonably necessary to punish and deter.' " OCF has failed, though, to provide this Court or the courts below any facts sufficient to reach such a conclusion. Certainly the Illinois Appellate Court did not believe the awards to respondents to exceed the amount

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dollars in punitive damages for what was a single course of conduct," A-97, his affidavit enumerates only one such payment, a payment of $1.2 million to the plaintiff in *Gizzi v. OCF*, A-94, which represented 60% of the $2 million in punitive damages awarded by a jury. *Id.*

Moreover, although the McOmber affidavit lists cases from other jurisdictions in which juries awarded punitive damages against OCF allegedly arising out of "[t]he same course of conduct" that provided the basis for the punitive damages awards in the instant case, the McOmber affidavit does not describe with any particularity the proof supporting the punitive damages awards in other cases.

Finally, the largest award of punitive damages identified in the McOmber affidavit was subsequently reduced by the trial court from $25 million to $2 million, and then further reduced on appeal to $1 million. *See Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.) (*en banc*), *cert. denied sub nom., OCF Corp. v. Dunn*, 114 S.Ct. 650 (1993), described in the McOmber affidavit at A-93, A-95.

necessary to punish OCF and to deter OCF *and others* from similar misbehavior; it expressly found that the punitive damages awards assessed against OCF "for willfully and wantonly causing five persons to suffer asbestosis" were appropriate punishment and thus did " 'not cross the line into the area of constitutional impropriety.' " A-28, quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24 (1991).

Furthermore, the financial "evidence" that OCF has sought to introduce in this Court, for the first time in this case, undercuts rather than supports OCF's claim that it has been or soon might be the victim of "overkill." Pet. at 19. Although to this Court, OCF has pleaded that its fortunes are at low ebb and that its prospects are dire unless the Court fashions a final, "national solution" to the asbestos crisis, OCF has been telling a different tale to its investors and to the SEC.

Thus, OCF's 1993 Third-Quarter Report, Form 10-Q, dated Nov. 15, 1993, and attached as A-117-153 to the Petition, discloses that OCF's management has few fears for OCF's future and that it does not regard OCF's past, pending, or prospective asbestos-related legal obligations, including the payment of punitive damages, as cause for any concern. Indeed, OCF's 1993 Third-Quarter Report, Form 10-Q assures that:

> in the opinion of management, the additional uninsured and unreserved costs which may arise out of pending personal injury and property damages asbestos claims and additional similar asbestos claims filed in the future will not have a materially adverse effect on [OCF's] financial position. While such additional uninsured and unreserved costs incurred in and after

> the year 2000 may be substantial over time, management believes that any such additional costs will not impair the ability of [OCF] to meet its obligations, to reinvest in its business or to take advantage of attractive opportunities for growth.

Id. at A-135.

To grant the relief that OCF seeks, the Court would have to determine, as a factual matter, that the punitive damages that OCF paid prior to the entry of judgment are sufficient to punish OCF for the harm that it has inflicted on the entire population of persons injured by its asbestos products. As the trial court noted, A-53, neither the aggregate amount of punitive damages awards that OCF has previously paid nor the conduct sought to be punished and deterred by such awards is adequately demonstrated in the record. Thus, even if the Fourteenth Amendment confers on tortfeasors the substantive right to avoid multiple punitive damages assessments, OCF would not be entitled to that constitutional protection in this case.

D. Recognition of a New Substantive Due Process Right To Avoid the Imposition of Multiple Punitive Damages Is Unnecessary To Protect Defendants from Excessive Punitive Damages Awards.

This Court has clearly held that the Due Process Clause protects defendants from "grossly excessive" punitive damages awards. *TXO*, 113 S.Ct. at 2720. The Court has just as clearly declined, however, to draw "a mathematical bright line between the constitutionally

acceptable and the constitutionally unacceptable that would fit every case." *Haslip*, 499 U.S. at 18; *TXO*, 113 S.Ct. at 2720. Informing this refusal has been the Court's recognition that punitive damages awards are properly "the product of numerous, and sometimes intangible, factors." *TXO*, 113 S.Ct. at 2720. Yet OCF insists that the Court must draw a bright line, by asking the Court to enshrine the defendants' actual and potential liability for punitive damages in other cases as a "factor" of constitutional dimension.

Whether, and the extent to which, a defendant that has been found guilty of a mass tort should be granted specific protection from multiple punitive damages awards is a policy matter best left state courts and legislatures. If, as OCF claims, "a national solution is necessary," Pet. at 13, the appropriate recourse for OCF is to petition Congress, not this Court. But the refusal of state courts and legislatures, and Congress, to implement the policy that OCF advocates "does not authorize the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions." *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986). Control of punitive damages in mass tort cases "may well be wise, but it is not the role of the Due Process Clause," which "carries no mandate for particular measures of reform." *Haslip*, 499 U.S. at 39 (Scalia, J., concurring). Thus, even if it were necessary to insulate defendants guilty of egregious mass torts from liability for multiple punitive damages, a necessity which respondents vigorously dispute, unprincipled and uncabined expansion of the Due Process Clause is not the way to achieve this result.

Moreover, whatever abstract need there might be for fabricating a new *constitutional* right, recognition of a constitutional right grounded in the Due Process Clause to be free from the imposition of multiple punitive damages awards is especially unwarranted on the facts presented on the record of this case. Illinois, like a growing number of other states,[7] expressly authorizes its reviewing courts to consider "the potential liability of the defendant" in determining whether a punitive damages award in a particular case is excessive. A-21-24; *Hazelwood v. Illinois Gulf Central R.R.*, 450 N.E.2d 1199, 1207 (Ill.App.Ct. 1983).[8] In the instant case, then, OCF did not

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[7] *See, e.g., Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989), described in *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991), authorizing Alabama courts to consider the existence of other civil awards against the defendant for the same conduct in reviewing a punitive award for excessiveness; Ga.Code Ann. par. 51-12-5.1(e) (Michie 1990), allowing only a single punitive award for all claims arising out of the same conduct; Mo.Ann.Stat. sec. 510.263(4) (Vernon 1952 & Supp. 1992), allowing defendant in a post-trial hearing to request credit for prior punitive damages awards arising from the same conduct.

[8] The *Hazelwood* court articulated three "factors which a[n] [Illinois] court should consider in determining whether a punitive damages award is excessive." *Hazelwood, supra*, 450 N.E.2d at 1207.

> The *first factor* is the nature and enormity of the wrong. While all acts which give rise to punitive damages are wilful and wanton, some of those acts are clearly more reprehensible than others. The egregiousness of the act should be reflected in the amount of the award. . . . Recognizing that punitive damages are in the nature of a criminal sanction, we are simply saying that the punishment should fit the

need the formulation of a new constitutional right to protect itself from repetitive, excessive punitive damages awards; it needed only to follow well-established Illinois procedure in bringing its proof to the court and the factfinder that any punitive damages award would be duplicative, excessive, or unnecessary. OCF's repeated

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> crime. An award which is disproportionate to the wrong serves none of purposes of punitive damages and is excessive.
>
> The *second factor* is the financial status of the defendant. Although an award so small that it would be only an ordinary item of expense does not serve the purposes of retribution and deterrence, and award which bankrupts the defendant is excessive. Punitive damages should be large enough to provide retribution and deterrence but should not be so large that the award destroys the defendant. Thus, before a court can gauge the award, it must first gauge the financial position of the wrongdoer. . . . Simply stated, the amount of the award should send a message loud enough to be heard but not so loud as to deafen the listener. A deafening award is excessive.
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> The *third factor* which should be considered is the potential liability of the defendant. This factor was noted in Comment *e* of section 908 of the Restatement of Torts [(Second)]:
>
> > "Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that might be granted in the future." 4 Restatement of Torts (Second), Section 908, comment *e* at 467 (1977).

Id. (emphasis in the original).

and unexplained failures to take advantage of the opportunities offered by existing procedures (and the consequences that flowed from OCF's tactical litigation decisions not to avail itself of these procedures) hardly warrants this Court's articulation of a new substantive due process right.

II. THE COURT SHOULD NOT GRANT REVIEW TO CONSIDER OCF'S PROCEDURAL DUE PROCESS ARGUMENT BECAUSE ILLINOIS' PROCEDURES FOR REVIEWING PUNITIVE DAMAGES AWARDS FULLY COMPORT WITH TRADITION, ARE NOT FUNDAMENTALLY UNFAIR, AND THEIR APPLICATION IN THIS CASE DID NOT DEPRIVE OCF OF PROCEDURAL DUE PROCESS.

During trial, OCF offered no evidence of its actual or potential liability for punitive damages in other asbestos cases. Its sole evidentiary support for its argument that it has been punished enough for causing injuries to respondents and tens of thousands of others exposed to its products is the affidavit of its counsel, which was attached to its post-trial motion. Both the trial court and the appellate court declined to consider the affidavit because it was offered for the first time after judgment.[9] The appellate court reasoned that the extent to which other punitive damages awards should affect the defendant's liability in a particular case should be decided in the first instance by the original factfinder, not the

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[9] The trial court nevertheless considered the evidence and held that it did not support OCF's claim that the punitive damages assessed in this case, coupled with the damages assessed in other cases, were excessive. A-53-54.

reviewing court. A-53. The court added that it would be unfair to consider the affidavit (which is, after all, hearsay) as probative evidence of OCF's potential liability for punitive damages in other cases; OCF's failure to produce the affidavit prior to trial prevented plaintiffs from assembling rebuttal evidence of OCF's potential punitive damage liability, and "plaintiffs cannot cross-examine an affidavit." A-53.

OCF now contends that by considering only the evidence produced at trial in reviewing the size of the punitive damage awards, the Illinois courts have denied OCF procedural due process. Of course, OCF cites no authority for its contention that the Constitution compels state courts reviewing punitive damages awards for excessiveness to admit and consider hearsay evidence offered for the first time after judgment. Instead, it notes that Alabama's procedure for reviewing punitive damages awards, adopted by that state in 1989,[10] allows post-trial submission of evidence, and suggests that the Court's approval of the Alabama procedure as *constitutionally adequate* in *Haslip* means that the procedure is *constitutionally required*.

It is frivolous for OCF to suggest, though, that *Haslip* adopts the Alabama procedures as a constitutional minimum. OCF cites no language from *Haslip* indicating that the procedures found adequate in that case are constitutionally required, and the Court has subsequently

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[10] The Alabama Supreme Court first suggested that its trial courts should conduct post-trial evidentiary hearings to facilitate review of punitive damage awards in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989).

approved state procedures for reviewing punitive damage awards that are "far less detailed and restrictive than those upheld in *Haslip*." *TXO*, 113 S.Ct. at 2727 (Scalia, J., concurring). Nothing in *Haslip* intimates that the traditional rule limiting a reviewing court to consideration of the evidence actually introduced at trial violates due process. On the other hand, even where punitive damages are involved, the Court has been "reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). It is axiomatic, as Justice Kennedy observed in *TXO*, "that a jury verdict must be reviewed in relation to the record before it." 113 S.Ct. at 2725 (Kennedy, J., concurring). Yet the rule proposed by OCF *as a constitutional requirement* would strip the jury of its traditional function, and vest the authority for deciding the extent to which prior punitive damage awards should affect a punitive damages calculation solely with the reviewing judges. Nothing in this Court's opinions suggests that the Due Process Clause requires such an abrupt and complete departure from traditional common-law procedures.

Because it is certainly conceivable that a defendant's presentation of "overkill" evidence to the jury might increase the likelihood that the jury will return a substantial punitive damages award, a defendant's decision whether to present such evidence to the jury or to forego the "overkill" defense is a difficult one. But the choice is easier than OCF implies, at least under Illinois law. If OCF had introduced its "overkill" evidence at trial, or at least presented it to the trial court in a motion prior to

judgment, it would have been assured that the reviewing court, if not the jury, would have considered such evidence in mitigation of its liability for punitive damages. More importantly, neither this Court nor any other court has ever held that the Due Process Clause protects litigants from having to make tough strategic decisions; every day, litigants in other types of cases are forced to make similarly difficult tactical choices. A criminal defendant with a record, for example, must open himself up to damaging cross-examination or give up the right to testify in his own defense. A defendant with a statute of limitations defense in a latent injury case must either produce proof that the plaintiff is actually injured (and thus deprive itself of a "no damages" defense if the limitations defense is unsuccessful) or abandon the limitations defense. The Due Process Clause does not protect litigants from bad facts or hard choices.

Illinois law permitted OCF to submit its "overkill" evidence to the trial judge outside the presence of the jury in a number of ways. OCF could have presented its "overkill" evidence at the pretrial hearing on punitive damages conducted by the trial court pursuant to Ill.Rev.Stat., ch. 110, par. 2-604.1 (1989). It could have filed a motion for summary judgment, attaching the "overkill" evidence. It could have moved for leave to submit the evidence in camera. OCF did none of these things.[11]

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[11] Additionally, if OCF withheld its "overkill" evidence from the jury because it did not wish to couple an "overkill" argument with an argument that its conduct did not warrant the imposition of punitive damages at all, it could have moved for a bifurcated trial, with compensatory damages and liability for punitive damages determined in the first phase, and the amount

Instead, it waited until after judgment, then sought relief from reasonable punitive damages awards based on hearsay evidence that respondents had no fair opportunity to rebut.[12]

Illinois' procedures for reviewing punitive damages awards are traditional, detailed, and meaningful. They are also evidently effective in curtailing unjustified and

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of punitive damages determined in the second. OCF failed to make such a motion.

[12] Ironically, just as OCF waived its rights to present its "overkill" evidence at trial, so too, it compounded that first waiver in the trial court by a second waiver in the Illinois Appellate Court. Thus, OCF waived its right to raise its procedural due process argument in this Court by failing to raise and preserve that argument in the Illinois Appellate Court. Although OCF now seeks to cloak that second failure by asserting that the procedures it failed to follow *in the trial court* were newly *"adopted by the Illinois Appellate Court in this case,"* A-18 (emphasis added), that claim is analytically preposterous. Simply put, the procedures that were followed by the trial court and that are focus of OCF's procedural complaint in this Court necessarily predated their "adopt[ion]" by the Illinois Appellate Court. What OCF posits was a new policy, "adopted by the Illinois Appellate Court in this case," was anything but new; instead of "adopt[ing]" a new policy, that court simply reiterated a time-honored one, that evidence available at the time of trial must be introduced at that time and not afterwards, and that a reviewing court's consideration of the facts is confined to a review of the matters of record at the time of judgment.

excessive awards of punitive damages.[13] Illinois' procedures provided OCF with all the process that it needed and all the process that was due under the Constitution.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be promptly denied.[14]

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[13] *See, e.g., Loitz v. Remington Arms Co., Inc.*, 563 N.E.2d 397 (Ill. 1990) (setting aside punitive award of $1.6 million as unsupported by the evidence); *Kemner v. Monsanto Co.*, 576 N.E.2d 1146 (Ill.App.Ct. 1991) (setting aside punitive award of $16.25 million as unsupported by the evidence).

[14] The Court's recent grant of certiorari in *Honda Motor Co. v. Oberg*, 851 P.2d 1084 (Or. 1993), *cert. granted*, 62 U.S.L.W. 26 (U.S. Jan. 18, 1994) (No. 93-644) should not delay its prompt denial of certiorari in this case. In *Oberg*, the Oregon Supreme Court interpreted the Oregon Constitution to prohibit post-trial review of punitive damage awards for excessiveness. 851 P.2d at 1091 n.7. The question that the Court agreed to review is whether "Oregon's denial of *any* judicial review of compensatory and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment." 62 U.S.L.W. at 26 (emphasis added).

The answer to the question presented in *Oberg* would not affect the Court's disposition of the instant case. Illinois, unlike Oregon, expressly authorizes trial and appellate courts to review punitive damage awards for excessiveness. ILL.REV.STAT. ch. 110, sec. 2-1207 (1989); *Hazelwood v. Illinois Gulf Central R.R.*, 450 N.E.2d 1199 (Ill.App.Ct. 1983). The Court should summarily decline to review state court decisions affirming awards of punitive damage where those states, unlike Oregon, clearly afford the litigants traditional procedural protections.

The complaints involved in the instant case were filed eight years ago. The verdict was returned by the jury almost four

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years ago. Respondents have already endured a stay of the appellate process to await the Court's decision in *TXO*, a decision which, as respondents had anticipated, did not add any merit to OCF's complaints on appeal. Twelve Illinois judges – the trial judge, the unanimous appellate court, and the eight justices of the Illinois Supreme Court who considered OCF's petition for leave to appeal – have rejected OCF's constitutional arguments based on the clear precedents of this Court. Respondents should not be forced to endure the injustice of another purposeless delay. The Court should deny OCF's Petition for Writ of Certiorari immediately.